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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 536

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

DAVID JESSIE GRAVES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR DAVID JESSIE GRAVES IN OPPOSITION

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MEMORANDUM FOR DAVID JESSIE GRAVES IN OPPOSITION

DAVID JESSIE GRAVES was tried and convicted in the State Courts for the State of Texas. He was and is confined in the Texas Department of Corrections as a result of such conviction. Habeas Corpus proceedings were filed in the State Courts. Adverse decision resulted in filing of Habeas Corpus proceedings in the Federal Court for the Eastern

District of Texas, Tyler Division, Honorable Wayne Justice presiding.

Counsel appointed for indigent petitioner by the Court. Proceedings on petition for Writ of Habeas Corpus heard April 21, 1969, in District Court of the United States for the Eastern District of Texas, Tyler Division. (App. pg 14) The District Court granted Petitioner's Writ by Memorandum Opinion reported at 301 F. Supp. 264 (1969) (Appendix "B" of Petition for Writ of Certiorari) The action of the District Court being affirmed in Opinion of Court of Appeals for the Fifth Circuit located at 424 Fed. 2nd, 524 (1970) and also Appendix "A" of Petition for Writ of Certiorari.

A stay of mandate was granted by the United States Court of Appeals to and including August 24, 1970, Application for Writ filed with the Supreme Court of the United States. The writer agrees with the result reached in the Opinions of the District Court as well as the Court of Appeals for the Fifth Circuit and feels strongly that the result is correct. However, Counsel also feels that the particular points involved in this cause are Constitutional stature and that for the clarification of the Constitutional aspects of the matter that the Honorable United States Supreme Court should grant the Petition for Certiorari filed by the Government because of possible conflict of interpretation between this cause and *Schmerber v. United States*, 86 Supreme Court 1826 (1960). In response to question number 1 presented in the Petition for Certiorari, the Respondent, DAVID JESSIE GRAVES, would respectfully show the Court

that the questions of waiver and deliberate bypass of state remedies as questioned by the Petitioner has always rested within the sound discretion of the Federal Habeas Judge as reflected in *Fay v. Noia*, 372 US 391, 83 Sup. Ct. 822, 9 L. Ed. 2nd 837 (1963). Thus it is apparent that both the District Court and the Court of Appeals for the Fifth Circuit utilized their discretion in favor of the Respondent, DAVID JESSIE GRAVES. In connection with this point also see *Mize v. Crouse*, 399 Fed. 2nd, 593 (Tenth Circuit 1968) and *Harris v. Beto*, 280 Fed. Supp. 532 (S.D. Texas 1967) Affirmed at 387 Fed. 2nd, 149 (Fifth Circuit 1967). In regard to the second point the Respondent would respectfully show that the results of the blood test was vitiated because the Police Chief informed the Respondent, DAVID JESSIE GRAVES, the blood would be used to determine the alcoholic content of his blood when the objective was to test the blood to determine the type and not the alcoholic content. In the words of the Fifth Circuit through Judge Wisdom "The Court scrutinizes the efficacy of a consent to a blood test secured by official strategem." To the writer this is a grave question of Constitutional stature and should be clarified by the United States Supreme Court especially in the view of numerous questions and interpretations placed upon the rights of Defendants under the rulings of the Court as reflected in *Schmerber v. United States* (cited above). In the Schmerber case the blood test was taken without the consent of the Defendant over his specific objections and over the specific objections of his Counsel, but the United States Supreme Court ruled that in that

particular situation and where the officer desires to take upon himself such action to prevent the disappearance of evidence "The interest in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." No such emergency existed in the instant case. An individual blood type remains constant and does not change and although Counsel disagrees with the result of *Schmerber*, it is the law at the present time. In this case the Chief of Police frankly testified that he took the blood to be utilized as evidence in the rape case under investigation. That Chief of Police Toler himself knowingly, willfully and intentionally secured the blood test and sample by official strategem and consequently the Respondent could not on the other end of the question knowingly, voluntarily, intelligently and willingly waive his rights in regard to the blood test. (No warnings of any kind administered to the Defendant in custody prior to the taking of the blood sample.)

The Petition argues *Frazier v. Cupp*, 394 U.S. 731 (1969) as being controlling on this point. However, we refer this Honorable Court to the Opinion of the Fifth Circuit in this cause and the footnote number 2 of the Opinion as located in the Appendix "A" of Petitioner's Petition for Writ of Certiorari at pages 15 and 16 of said Appendix.

Therefore, Counsel approaches this response with mixed emotions, being completely in agreement with the result and the reasons therefor reached by both the District Court and the Court of Appeals for the Fifth Circuit in regard to his client, DAVID JESSIE GRAVES, Counsel still feels that the Writ of Certiorari filed herein by the State of Texas should be granted and that the Supreme Court of the United States settle the law for the Courts of the country on the points involved in this cause.

Respectfully submitted,

WELDON HOLCOMB
Attorney by Appointment
for David Jessie Graves
November, 1970

CERTIFICATE OF SERVICE

I, Weldon Holcomb, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Memorandum in Opposition on behalf of DAVID JESSIE GRAVES, Respondent in this cause No. 536 upon the Docket of the Supreme Court of the United States of America for the October Term, 1970, has been served on Counsel for Petitioner by depositing five copies of the same in the United States mail, postage prepaid, addressed to Mr. Robert C. Flowers, Assistant Attorney General of Texas, at his office address of Box "R", Capitol Station, Austin, Texas 78711, this the .... day of ....., 19 ..

.....

Weldon Holcomb
Attorney for Respondent